(1) Supreme Court, U.S.
FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

SERGIO OSORIO-SANCHEZ,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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23 pp

QUESTIONS PRESENTED

I. Whether petitioner's prison sentence of 64 months -- well above the two-year statutory maximum prison sentence authorized under 8 U.S.C. § 1326(a) -- is illegal because the indictment setting out the charge against him did not allege that petitioner was convicted of an "aggravated felony" prior to his deportation from the United States and his illegal reentry into the United States?

(Subsidiary Questions)

Should this Court overrule the decision in Almendarez-Torres v. United States, 523 U.S. 224(1998), in light of Apprendi v. New Jersey, 530 U.S.466 (2000)?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

INDEX TO APPENDICES.....iii

TABLE OF AUTHORITIES.....iv

OPINION BELOW.....1

JURISDICTION.....1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....1

STATEMENT OF THE CASE.....3

A. Proceedings Below.....3

B. Statement of Relevant Facts.....4

REASONS FOR GRANTING WRIT.....6

CONCLUSION.....12

INDEX TO APPENDICES

Appendix A Per Curiam Opinion of the United States Court of Appeals for the Fifth Circuit, in United States v. Sergio Osorio-Sanchez, No. 01-11425 (5th Cir. Jun. 19, 2002).

TABLE OF AUTHORITIES

Page

CASES

Almendarez-Torres v. United States,
523 U.S. 224 (1998).....i,4-11

Apprendi v. New Jersey,
530 U.S. 466 (2000).....i,4,6,8,9

Booth v. Maryland,
482 U.S. 496 (1987).....10-11

Grady v. Corbin,
495 U.S. 508 (1990).....10

Hill v. United States,
368 U.S. 424 (1962).....11

Payne v. Tennessee,
501 U.S. 808 (1991).....10

South Carolina v. Gathers,
490 U.S. 805 (1989).....11

United States v. Cabrera-Teran,
168 F.3d 141 (5th Cir. 1999).....9-10

United States v. Dixon,
509 U.S. 688 (1993).....10

TABLE OF AUTHORITIES – Continued

Page

CASES

United States v. Forbes,
16 F.3d 1294 (1st Cir. 1994).....10,11

United States v. Osorio-Sanchez,
No. 01-11425 (5thCir. Jun. 19, 2002).....iii,1,4

United States v. Zangger,
848 F.2d 923 (9th Cir. 1988).....10

STATUTES

8 U.S.C. § 1326.....1,3

8 U.S.C. § 1326(a).....i,5,7,9,10

8 U.S.C. §1326(b)(2).....5,6,7,9

18 U.S.C. § 3291.....1

18 U.S.C. § 3742.....1

28 U.S.C. § 1254(1).....1

28 U.S.C. § 1291.....1

RULES

Fed. R. Crim. P. 12 (b)(2).....11

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES CONSTITUTION

U. S. Const. amend. V.....2

U. S. Const. amend. VI.....3

OPINION BELOW

The per curiam opinion of the Court of Appeals is captioned United States v. Sergio Osorio-Sanchez, No. 01-11425 (5th Cir. Jun. 19, 2002), and is unpublished. A reformatted document of the manuscript opinion of the Court of Appeals is attached as Appendix A.

JURISDICTION

The judgment and opinion of the Court of Appeals were filed on Jun. 19, 2002. See Appendix A. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The United States District Court, Northern District of Texas, Dallas Division, exercised jurisdiction pursuant to 18 U.S.C. § 3291. Jurisdiction vested in the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1291, and also pursuant to 18 U.S.C. § 3742.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The federal statute at issue in this case -- 8 U.S.C. § 1326 -- provides in pertinent part that:

(a) In general

Subject to subsection (b) of this section, any alien who --

> (1) has been ... deported . . . , and thereafter
>
> (2) is at any time found in, the United States, unless . . . the Attorney General has expressly consented to such alien's reapplying for admission . . .
>
> shall be fined under Title 18, or imprisoned not more than 2 years, or both.
>
> **(b) Criminal Penalties for reentry of certain removed aliens**
>
> Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection –
>
> * * *
>
> (2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under Title 18, imprisoned not more than 20 years, or both.

The questions presented in this petition also require consideration and application of the Due Process Clause of the Fifth Amendment to the United States Constitution, which provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or

> naval forces, or in the Militia, when in actual service in time of War or public danger;...nor be deprived of life, liberty, or property without due process of law.

The Sixth Amendment to the United States Constitution is also implicated in this case, and provides in relevant part that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations;...

STATEMENT OF THE CASE

A. Proceedings Below

The petitioner herein, Mr. Osorio, was arrested by federal agents of the Immigration and Naturalization Service, and charged by indictment with illegally reentering the United States after having previously been deported, in violation of 8 U.S.C. § 1326. The indictment made no mention of an allegation that Mr. Osorio had previously been convicted of an "aggravated felony."

Mr. Osorio entered a guilty plea to the illegal reentry charge before the United States District Court for the Northern District of Texas. Subsequently, Mr. Osorio appeared for sentencing. The district court sentenced Mr. Osorio to a 64 month term of imprisonment, followed by a three year term of supervised release.

Mr. Osorio appealed to the United States Court of Appeals for the Fifth Circuit. On direct appeal, Mr. Osorio filed an appellate brief challenging the sentence which had been imposed by the district court. As a basis for the attack on his sentence, Mr. Osorio relied upon this Court's proclamation in Apprendi v. New Jersey, 530 U.S.466 (2000), that those factors which generate a higher statutory maximum penalty are offense elements, and upon Justice Thomas's concurring opinion, disavowing the earlier result reached in Almendarez-Torres v. United States, 523 U.S. 224 (1998). Over this challenge, the Fifth Circuit granted the Government's motion for summary affirmance, in a per curiam, unpublished opinion. See United States v. Sergio Osorio-Sanchez, No. 01-11425 (5th Cir. 2002) (Appendix A).

B. Statement of Relevant Facts

The indictment in this case charged (in relevant part) that:

On or about May 17, 2001 in the Dallas Division of the Northern District of Texas, the Defendant, **SERGIO OSORIO-SANCHEZ**, an alien who had previously been arrested and deported from the United States on or about December 3, 1998, was found in the United States, in the Northern District of Texas, without having received the consent of the Attorney General of the United States to apply for readmission since the time of the Defendant's previous deportation.

In violation of Title 8, United States Code, Sections 1326(a) and (b)(2).

Although the indictment averred that the conduct described therein was "[i]n violation of Title 8, United States Code, Section 1326(a) and (b)(2)," the indictment did not allege that Mr. Osorio had been convicted of an aggravated felony offense previous to his deportation from the United States.

Following his guilty plea to this charge, the district court sentenced Mr. Osorio to a 64 month prison term. This sentence was premised upon a recommendation in the Presentence Report (prepared by the United States Probation Office at the bidding of the district court) that Mr. Osorio's sentence range be raised from a maximum of two years to a maximum of twenty years, because Mr. Osorio had been convicted of an "aggravated felony" offense prior to his

deportation. This recommendation in the Presentence Report accorded with this Court's 5-4 holding in Almendarez-Torres v. United States, 523 U.S. 224, 226-27 (1998), that the "aggravated felony" provision of 8 U.S.C. § 1326(b)(2) does not state an offense element of a separate, aggravated illegal reentry offense.

On direct appeal from the sentence imposed by the district court, Mr. Osorio relied upon this Court's 5-4 majority opinion in Apprendi v. New Jersey, 530 U.S.466 (2000), together with Justice Thomas's concurring opinion in the Apprendi case, to call into dispute the continuing validity of Almendarez-Torres, and asked the Fifth Circuit to reverse and vacate the sentence which the district court had imposed.

REASONS FOR GRANTING THE WRIT

I. Because the United States Constitution requires that prior convictions which increase the offense statutory maximum be treated as offense elements, this Court should grant certiorari here to reconsider the Court's contrary holding in Almendarez-Torres v. United States, 523 U.S. 224 (1998).

A. This Court Should Overrule Almendarez-Torres.

In Almendarez-Torres v. United States, 523 U.S. 224 (1998), this Court held, in a five-to-four decision, that an indictment in an illegal reentry case need not allege a defendant's prior "aggravated felony" conviction in order for a district court to sentence the defendant to an "enhanced" sentence under 8 U.S.C. § 1326(b)(2), based on the defendant's prior conviction. Almendarez-Torres, 523 U.S. at 247. The majority held that § 1326(b)(2) merely created a "sentencing factor" that need not be pleaded in the indictment in order to result in an enhanced sentence based on a defendant's prior "aggravated felony" conviction. Id. at 243. Justice Scalia, joined by Justices Stevens, Souter and Ginsburg, dissented from the Court's holding in Almendarez-Torres. Id. at 248. The dissenting Justices, led by Justice Scalia, contended that § 1326(b)(2) was not merely a "sentencing factor" but, instead, was a separate offense. Id. at 270-71. As a result, the dissenters contended, the fact of a defendant's prior conviction had to be specifically alleged in the indictment in order for a district court to impose an "enhanced" sentence above the two-year maximum sentence provided for by 8 U.S.C. § 1326(a). Id.

On June 26, 2000, this Court issued its decision in Apprendi v. New Jersey, 530 U.S.466 (2000), which addressed the constitutionality of an enhanced prison sentence under New Jersey's "hate crime" sentencing enhancement statute. In Apprendi, a jury had not found the operative "sentencing fact" beyond a reasonable doubt and, instead, the trial court simply had found the operative fact by a preponderance of the evidence at the sentencing hearing. This Court held that Apprendi's enhanced sentence was unconstitutional.

In the course of this Court's reasoning in Apprendi, the Court stated that "it is arguable that Almendarez-Torres was incorrectly decided." Apprendi, 530 U.S. at 489. As further explication for this pronouncement, footnote 15 of the Court's decision went on to note that "[i]n addition to the reasons set forth in Justice Scalia's dissent [in Almendarez-Torres], 523 U.S. at 248-60, it is noteworthy that the Court's extensive discussion of the term 'sentencing factor' virtually ignored the pedigree of the pleading requirement at issue." Id. (citing United States v. Reese, 92 U.S. 214, 232-33 (1876)).

Significantly, Justice Thomas, who had been in the five-Justice majority in Almendarez-Torres, wrote a lengthy and detailed concurring opinion in Apprendi. Apprendi, 530

U.S. at 498-523 (Thomas, J., concurring). In this concurring opinion, Justice Thomas expressed his view that Almendarez-Torres, where he had cast the deciding vote for the majority, had been wrongly decided. Apprendi, 530 U.S. at 520-21 (Thomas, J., concurring). Thus, when Justice Thomas's vote is combined with those of the four dissenters in Almendarez-Torres (Justices Scalia, Stevens, Souter, and Ginsburg), it is now plain that five Members of the Court are of the view that Almendarez-Torres was incorrectly decided.

In light of the majority opinion and Justice Thomas's concurring opinion in Apprendi, together with the reasons assigned by Justice Scalia in his dissent in Almendarez-Torres, this Court should now overrule Almendarez-Torres. The decision no longer represents the view of a majority of the Court. If this Court were to do so, such a reversal of course would require this Court to vacate Mr. Osorio's 64-month sentence and remand for resentencing under 8 U.S.C. § 1326(a), which provides for a two-year statutory maximum sentence. As noted above, the indictment in this case did not allege any prior "aggravated felony" conviction.[1]

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[1]Although the indictment in this case did allege that the offense conduct described therein was "[i]n violation of Title 8, United States Code, Section 1326(a) and (b)(2)," such a "bare" statutory reference in the indictment is insufficient to plead a violation of 8 U.S.C. § 1326(b)(2). See, e.g., United States v.

Thus, the district court's sentence of 64 months -- which is well above the twenty-four month maximum sentence provided for in 8 U.S.C. § 1326(a) -- is illegal assuming that the dissenting opinion in Almendarez-Torres is, as it now appears plainly to be, the present position of a majority of this Court.[2]

Cabrera-Teran, 168 F.3d 141, 145-46 (5th Cir. 1999); United States v. Forbes, 16 F.3d 1294, 1297 (1st Cir. 1994); United States v. Zangger, 848 F.2d 923, 925 (9th Cir. 1988).

[2]*Stare decisis* should not preclude a decision by this Court to overrule Almendarez-Torres. As this Court noted in United States v. Dixon, 509 U.S. 688, 704-13 (1993), as it overruled the decision rendered by the Court three years earlier in Grady v. Corbin, 495 U.S. 508 (1990);

> ...Although *stare decisis* is the "preferred course" in constitutional adjudication, "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'"

Dixon, 509 U.S. at 712 (internal citations omitted). In both Grady and Almendarez-Torres, the initial opinion was rendered by a sharply divided Court with four dissenters from the five member majority. In both cases the dissenters argued that the majority opinion was contrary to the historical treatment of the issue and represented a sharp break with that past understanding.

Likewise, in Payne v. Tennessee, 501 U.S. 808, 827-30 (1991), the Court, citing the same principle, overruled its prior decisions in Booth v. Maryland, 482

B. Petitioner's Claim Is Properly Raised at this Juncture in His Case.

In keeping with the common law tradition, a court may correct an illegal sentence -- that is, one imposed in excess of the applicable statutory maximum -- "at any time." Hill v. United States, 368 U.S. 424, 430 & n.8 (1962). A claim such as that at bar may be raised at any time before the defendant's conviction and sentence become final on appeal. Because Mr. Osorio's indictment lacked an essential element of the offense upon which his sentence was based, such a claim may be raised "at any time during the pendency of the proceedings" in the case. United States v. Forbes, 16 F.3d 1294, 1297 (1st Cir. 1994) (citing Fed. R. Crim. P. 12(b)(2)).

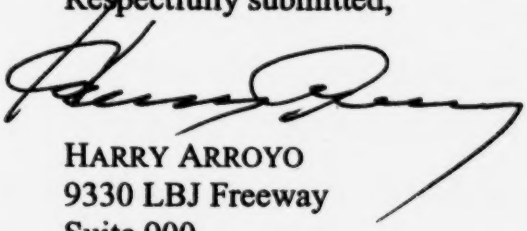
U.S. 496 (1987) and South Carolina v. Gathers, 490 U.S. 805 (1989). The Court in Payne observed that "Booth and Gathers were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions." Id. at 828-29.

Almendarez-Torres, like the overruled decisions in Grady, Booth, and Gathers, was decided by the narrowest possible of margins, over the spirited dissent of Justice Scalia, challenging the basic underpinnings of the Almendarez-Torres majority's opinion. Because it seems that a majority of the Court now recognizes that the majority opinion in Almendarez-Torres was badly reasoned, and that the case was wrongly decided, the prudential doctrine of *stare decisis* should afford no barrier to the appropriate course here - a reversal of Almendarez-Torres.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari, vacate the judgment of the Fifth Circuit, and remand for resentencing.

Respectfully submitted,



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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-11425
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SERGIO OSORIO-SANCHEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC NO. 3:01-CR-187-2-L

Before HIGGINBOTHAM, DAVIS, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM: *

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

No. 01-11425

Sergio Osorio-Sanchez appeals the sentence imposed following his guilty plea conviction of being found in the United States after deportation in violation of 8 U.S.C. § 1326. Osorio-Sanchez contends that 8 U.S.C. § 1326(a) and 8 U.S.C. 1326 (b) (2) define separate offenses. He argues that the aggravated felony conviction that resulted in his increased sentence is an element of the offense under 8 U.S.C. § 1326 (b) (2) that should have been alleged in his indictment. Osorio-Sanchez maintains that he pleaded guilty to an indictment which charged only simple reentry under 8 U.S.C. § 1326 (a). He argues that his sentence exceeds the two-year maximum term of imprisonment which may be imposed for that offense.

In Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998), the Supreme Court held that the enhanced penalties in 8 U.S.C. § 1326 (b) are sentencing provisions,

not elements of separate offenses. The Court further held that the sentencing provisions do not violate the Due Process Clause. Id. at 239-47. Osorio-Sanchez Acknowledges that his argument is foreclosed by Almendarez-Torres, but asserts that the decision has been cast into doubt by Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). He seeks to preserve his argument for further review.

Apprendi did not overrule Almendarez-Torres. See Apprendi, 530 U.S. at 489-90; United States v. Daveit, 231 F.3d 979, 984 (5th Cir. 2000), cert. denied, 531 U.S. 1202 (2001). This court must follow Almendarez-Torres "unless and until the Supreme Court itself determines to overrule it." Dabeit, 231 F.3d at 984 (internal quotation marks and citation omitted). The judgment of the district court is AFFIRMED.

In lieu of filing an appellee's brief, the Government has filed a motion asking this court to dismiss this appeal or, in the alternative, to summarily affirm the district court's

judgment. The Government's motion to dismiss is DENIED. The motion for summary affirmance is GRANTED. The Government need not file an appellee's brief.

AFFIRMED; MOTION TO DISMISS DENIED; MOTION FOR SUMMARY AFFIRMANCE GRANTED.